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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ELIJAH BROWN, JR., Defendant and Appellant.	B213002 (Los Angeles County Super. Ct. No. MA037761)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Murphy, Judge. As modified, affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Elijah Brown, Jr., appeals from the judgment entered after he was convicted of possessing marijuana for sale. We hold there was sufficient evidence that appellant knowingly possessed the marijuana. We also reject his other claims of evidentiary and instructional error. We modify the judgment to correct the amount of restitution fines imposed and affirm the modified judgment.

FACTS AND PROCEDURAL HISTORY

While staking out a liquor store suspected of selling alcohol to minors, Los Angeles County Sheriff's Detective Gregory Kelly spotted three men selling marijuana outside the store, leading to the arrests of Richard Elijah Brown, Jr., Brian Williams, and Robert Espree. Espree pleaded no contest to a charge of possessing marijuana for sale. (Health & Saf. Code, § 11359.) Williams and Brown were tried jointly and both were convicted of the same offense.

At trial, Detective Kelly testified that at around 7:00 p.m. on January 17, 2007, he was in a parked pickup truck across from the Challenger Liquor store in Lancaster, on the lookout for unlawful alcohol sales, when appellant drove up and parked his black Dodge in front of the store. Appellant, Williams, and Espree got out of the car and went into the store. When they came out a few minutes later, appellant and Williams got back in the car, while Espree remained out in front of the store. Appellant backed up the Dodge a short distance and parked in the store's parking lot. Kelly, who was using binoculars, saw Espree approach and speak with almost everyone who came to the store. Eventually, Espree spoke with the driver of a gold Chevrolet, and then walked to the driver's side window of appellant's car, where he was handed a small object. Kelly was not sure whether appellant or Williams handed the object to Espree, however. Kelly saw Espree walk back to the gold Chevy and exchange the object in his hand for cash. Espree then walked back to the Dodge and handed the cash to Williams.

Detective Kelly then saw Espree walk back and forth to the Dodge a few times, once getting in the car's back seat before reemerging and returning to the front of the liquor store. Williams got out of the car one time to smoke a cigarette and speak with

Espree, and then he returned to the Dodge. As Kelly kept watch, he saw a man come from behind the store and speak briefly with Espree. Espree walked backed to the Dodge, reached inside the driver's side window, and retrieved another small object. As before, Espree handed the object to the man in exchange for cash, then returned to the Dodge and handed the cash back through the driver's side window.

Detective Kelly had extensive experience investigating the sale, possession, and transportation of drugs. Believing that appellant, Espree, and Williams might be selling drugs, Kelly contacted Deputies Shreves and Pokorny, who were waiting nearby in a marked patrol car to assist with Kelly's stakeout. Shreves and Pokorny drove to the liquor store to investigate. Shreves asked Espree if he knew the people in the black Dodge. Espree said he did not. Shreves searched Espree and found no contraband. Shreves then walked over to the Dodge. As he neared the driver's side window, Shreves smelled the powerful odor of unsmoked marijuana. Appellant said Espree was his cousin, denied knowing anything about marijuana in the car, and agreed to a search of both himself and the Dodge. A Tupperware container with 5.54 grams of marijuana in seven individually wrapped packages was found right beneath the driver's seat. Appellant did not have marijuana on his person, but he did have 20 five-dollar bills in his pockets, and a total of $104 or $105 in his possession. No paraphernalia for smoking marijuana was found.

Deputy Pokorny approached the front passenger's window, where Williams was seated, and also smelled the strong odor of unsmoked marijuana. Williams admitted he had marijuana, and the five packages he possessed contained a total of 9.51 grams of marijuana. Williams denied talking to anyone at the store. Espree apologized for having denied speaking to people at the store, but said he was a "ladies man" and a "Casanova." He denied knowing about the marijuana found on Williams and appellant. Appellant told Pokorny he drove Williams and Espree to the liquor store, but could not explain why they had been there for so long. Appellant denied knowing anything about the marijuana and also denied that Espree ever came to his window to retrieve an object or hand over cash.

Deputies Shreves and Pokorny each offered the expert opinion that the marijuana found in the Dodge was possessed for the purpose of sale. Appellant was the only one of the three men with money in his possession, which was consistent with him being in control of the sales operation.

The information alleged that appellant had a 1994 carjacking conviction that qualified as a "strike" under the "Three Strikes" law. At sentencing, appellant asked the court to dismiss the allegation, but the trial court denied the request. Instead, it imposed the low-term sentence of 16 months, which was doubled under Three Strikes.

Appellant contends there was insufficient evidence that he knew there was marijuana in the car or that he had possession of the marijuana. He also contends the trial court erred by: (1) excluding evidence of a written statement by Espree that appellant knew nothing about and had nothing to do with the marijuana found in the Dodge; (2) instructing the jury with CALCRIM No. 300 that he was not obligated to produce all the evidence in his favor; (3) instructing the jury with CALCRIM No. 358 to view with caution the statements he made to Deputies Shreves and Pokorny; and (4) denying his motion to dismiss the one Three Strikes allegation made against him. He also contends the abstract of judgment must be corrected to properly reflect certain restitution fines imposed by the trial court.

DISCUSSION

1. *There Was Sufficient Evidence of Knowledge and Possession*

In order to convict appellant of possessing marijuana for sale, the prosecution had to show that he possessed the marijuana with knowledge of both its presence and illegal character. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.) Appellant contends there was insufficient evidence of either possession or knowledge. Possession may be either actual or constructive. Constructive possession exists where the defendant, either by himself or with another, had the right to exercise dominion and control over the

place where the drugs were found. (*People v. Valerio* (1970) 13 Cal.App.3d 912, 921.) These elements may be shown by circumstantial evidence. (*Meza, supra,* at p. 1746.)

Appellant contends that evidence the marijuana was found under his seat was insufficient to show possession. He supports this contention with Williams's trial testimony that before arriving at the liquor store, he saw Espree with the Tupperware container at appellant's house and also saw Espree sitting in the driver's seat of the Dodge. Evidence that the marijuana gave off so strong an odor that Deputies Pokorny and Shreves could smell it as they approached the Dodge is also insufficient because there was no evidence that appellant knew what marijuana smelled like or that his sense of smell was keen or even intact. In short, appellant contends evidence of possession and knowledge is speculative at best and therefore insufficient to sustain the judgment. We disagree.

First, there was expert testimony that marijuana was being sold from the Dodge. Second, that Dodge belonged to appellant, under whose seat a container of marijuana was found. Third, Detective Kelly saw objects being handed from appellant's window to Espree, and saw Espree deliver those objects and then return with cash, which Espree handed to *appellant*. Fourth, appellant was the only one who had money on him, including 20 five-dollar bills, a fact that drug sales expert Deputy Pokorny testified was consistent with appellant being the head of the sales operation. Combined, this evidence easily permits an inference that appellant was actually involved in the sale transactions, which necessarily includes possession of the marijuana by way of its transfer to Espree and knowledge that it was marijuana he was selling.[1] Accordingly, we hold there was sufficient evidence that appellant possessed the marijuana and knew what it was.

2. *Evidence of Espree's Exculpatory Statement*

During trial, appellant tried to introduce a signed and notarized statement from Espree dated March 21, 2007, that said, in effect, the container of marijuana found under

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[1] Appellant cites several decisions concerning the insufficiency of the evidence to show knowledge or possession, but none involves evidence like this.

appellant's seat was Espree's and that appellant knew nothing about it being there. Appellant contended the statement was admissible as a declaration against Espree's penal interest (Evid. Code, § 1230), because Espree had taken the stand and refused to answer questions on the topic pursuant to his constitutional right against self-incrimination. The trial court refused to admit the statement because it was not sufficiently trustworthy. Appellant contends the court erred.

Under Evidence Code section 1230, a declarant's out-of-court statement may be admitted for its truth if, when made, the statement was against the declarant's penal interest. In order to admit Espree's statement, appellant had to show that Espree was unavailable, that the declaration was against Espree's penal interest, and that the statement was sufficiently reliable to warrant admission even though it was hearsay. (*People v. Geier* (2007) 41 Cal.4th 555, 584.) In determining trustworthiness, the court may consider not just the words, but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. We review the trial court's decision under the abuse of discretion standard. (*Id.* at pp. 584-585.)

The statement was dated March 21, 2007, which, according to the prosecutor, was nine days after Espree was offered the plea agreement for a 90-day sentence that he finally accepted in July 2008. Thus, when Espree made the statement, he was already looking at a relatively short jail term, meaning he had little to lose by taking all the blame. For this reason, combined with the fact that Espree was appellant's cousin, often spoke with appellant while in the courthouse hallway, and had given inconsistent statements about the marijuana to the arresting deputies, the prosecutor argued the declaration was not reliable. We agree with the trial court that these circumstances raised sufficient doubt about the reliability of Espree's statement. At a minimum, we cannot conclude that the trial court abused its discretion when it relied on these circumstances to make its finding of unreliability.

3. *CALCRIM No. 300 Is Constitutional*

The jury was instructed with CALCRIM No. 300, which states that neither side is required to call "all" witnesses with knowledge about the case or to produce "all" physical evidence that might be relevant. Appellant contends this instruction violated his constitutional right to have the jury properly instructed on the burden of proof because it might have misled the jury to believe he had an obligation to produce "some" evidence. This contention has been rejected by every one of our sister courts to consider it. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 117; *People v. Felix* (2008) 160 Cal.App.4th 849, 858; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189-1190; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927, 937-938; *People v. Simms* (1970) 10 Cal.App.3d 299, 313 [construing the substantially similar CALJIC No. 2.11].)

Appellant asks us to depart from their holdings, but we see no reason to do so. As in those decisions, CALCRIM No. 300 is a correct statement of law, and the jury was properly instructed on the burden of proof, the presumption of innocence, and a defendant's right not to testify. Accordingly, we hold the jury was properly instructed.

4. *The Trial Court Properly Instructed With CALCRIM No. 358*

The jury was instructed with CALCRIM No. 358 that as to evidence of oral statements made by the defendants before trial, it had to determine whether those statements were made, and to view with caution evidence of any oral statements that were not verified in writing or by some other means. Appellant contends the instruction applies only to hearsay *inculpatory* statements and improperly directed the jury to view with caution his *exculpatory* denial of knowledge of the marijuana made to the arresting deputies.

Appellant is correct that the cautionary language of CALCRIM No. 358, and its predecessors CALJIC Nos. 2.71 and 2.71.1, applies only to a defendant's hearsay admissions or other inculpatory statements. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1135-1136; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1158-1159, overruled on

another ground by *People v Dollin* (2009) 45 Cal.4th 390, 421, fn. 22; Bench Notes to CALCRIM No. 358 (2009-2010) p. 132 [when there is evidence of incriminating oral statement by defendant, court has sua sponte duty to instruct jury to view with caution evidence of such statements].) As respondent points out, however, appellant's denial of knowledge concerning the marijuana had a possible inculpatory meaning because, if determined to be false, it would show a consciousness of guilt. (*People v. Vega* (1990) 220 Cal.App.3d 310, 318.) The jury was instructed that knowingly false statements by the defendants could be viewed as consciousness of guilt. When CALCRIM No. 358 was combined with this instruction, it was therefore proper.

Alternatively, the instruction was proper as to Williams, who admitted to the deputies that he had marijuana. To the extent clarification of this instruction was required, appellant's failure to request clarifying language waives any claim of error. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 122.)

Finally, even if error occurred, the evidence of appellant's guilt was very strong and a different result was not reasonably probable. Therefore any error was harmless. (*People v. Prieto* (2003) 30 Cal.4th 226, 251-252.)

5. *Failure to Dismiss the Three Strikes Allegation*

Appellant had a 1994 conviction for carjacking that was alleged as a "strike" under the Three Strikes sentencing law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Since then, his only offenses were two local animal control violations in 2006. He asked the trial court to dismiss the Three Strikes allegation, pointing out that since his release from jail in 1999, he had gone to school to obtain a real estate license. At the time of his arrest in this case, he was working as a loan officer and a truck driver while his real estate license was pending. He continued to deny taking part in marijuana sales and asked the court to show him leniency. The trial court denied the request. Given the serious nature of the carjacking conviction, the court said a high-term sentence might be called for, but the court said it would show appellant leniency by instead imposing the

16-month low-term sentence, which the court doubled to 32 months under Three Strikes. Appellant contends the trial court erred.

The trial court had discretion to dismiss the Three Strikes priors in the interests of justice under Penal Code section 1385. We review the trial court's ruling under the abuse of discretion standard. As such, appellant carries the burden of showing that the trial court's ruling was irrational or arbitrary. Absent such a showing, we presume the trial court acted to further the legitimate sentencing objectives of the Three Strikes law. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 904.) Nor may we reverse just because reasonable people might disagree with the ruling. (*Ibid.*) As a result, an abuse of discretion occurs only when the trial court was not aware of its discretion to dismiss, where the court considered impermissible factors, or where its decision was not in conformity with the spirit of the law. (*Id.* at pp. 904-905.) The analytical touchstone is whether, in light of the nature and circumstances of the present felonies and prior qualifying convictions, and the particulars of the defendant's background, character, and prospects, he may be deemed outside the spirit of the Three Strikes law, in whole or in part, and should therefore be treated as if he had not previously been convicted of the other qualifying felonies. (*Id.* at p. 905.)

Brown points out that his carjacking conviction occurred 13 years before the current offense, and his only other offenses since then had been two minor violations of local animal control laws. Between 1983 and 1993, he had numerous convictions for, among others, burglary, drug sales, battery, driving while intoxicated, and driving with a suspended license. Therefore, his criminal behavior showed a marked and substantial decrease since the 1994 carjacking conviction. His current offense was nonviolent. Combined with his recent efforts to improve himself, appellant contends the trial court abused its discretion by refusing to dismiss the Three Strikes allegation.

While a case can be made that the trial court would not have abused its discretion if it had dismissed the Three Strikes allegation, we disagree that the court abused its discretion by failing to do so. Appellant had a lengthy criminal record from 1983 through 1994. Between his release from jail in 1999 until 2007, he remained relatively law-

abiding, but he apparently chose to resume his criminal career by engaging in the sale of marijuana. He had one previous conviction for selling drugs. Based on this, we conclude no abuse of discretion occurred.

Finally, even if error occurred, it was harmless beyond a reasonable doubt. The trial court believed the high-term sentence was warranted in this case based on the seriousness of the 1994 carjacking conviction. The high-term sentence is 36 months. (*People v. Earley* (2004) 122 Cal.App.4th 542, 549.) Therefore, if the trial court had dismissed the strike allegation and chosen instead to impose the high-term sentence, appellant would have received a longer sentence.

6. *The Abstract of Judgment Must Be Corrected to Properly Reflect the Restitution Fines*

At the sentencing hearing, the court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), and a $200 parole revocation fee (Pen. Code, § 1202.45), but stayed the parole revocation fine. The abstract of judgment states that $400 fines were imposed under both sections, however. Appellant contends, and respondent concedes, that we should modify the abstract of judgment to reflect the fines the trial court actually imposed. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.) We will do so.

DISPOSITION

The abstract of judgment is modified to state that restitution (Pen. Code, § 1202.4, subd. (b)) and parole revocation (Pen. Code, § 1202.45) fines of $200 each were imposed, and that the parole revocation fine was stayed. The matter is remanded to the

clerk of the superior court with directions to prepare a corrected abstract of judgment and forward it to the Department of Corrections. The judgment as so modified is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.